Supreme Court, U.S.
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No.

In The

# Supreme Court of the United States

October Term, 1993

COMMONWEALTH OF PENNSYLVANIA,

*Petitioner,*

*vs.*

JOHN DOMINICK TRAVIS,

*Respondent.*

*Petition for Writ of Certiorari to the Supreme Court of Pennsylvania*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether review of a state court's invasion of the province of a criminal jury and reversal of a conviction for first degree murder in a manner contrary to the spirit of Article III, Section 2 of the United States Constitution is mandated as a matter of federal public policy in order to adequately ensure the safety of all citizens when reversal of the jury's verdict is premised on a two-to-one panel decision of the state's first level appellate court and the state's highest appellate court denied discretionary review?

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## OPINIONS BELOW

The order of the Supreme Court of Pennsylvania denying discretionary review is unreported and is reprinted in the Appendix at page 1a.

The order of the Superior Court of Pennsylvania denying the Petitioner's Application for Reargument is unreported and is reprinted in the Appendix at page 2a.

The judgment of the Superior Court of Pennsylvania dated January 5, 1993, reversing the conviction and discharging the Respondent is unreported and is reprinted in the Appendix at pages 3a-16a.

The dissenting memorandum filed by Justice Justin Johnson is unreported and is reprinted in the Appendix at pages 17a-27a.

The order and decision of the trial court dated July 11, 1991, denying the Respondent's post-trial motions is unreported and is reprinted in the Appendix at pages 28a-52a.

## STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Pennsylvania was attested on February 18, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Article III, Section 2, provides in pertinent part as follows:

> The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial

shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

## STATEMENT OF THE CASE

On January 5, 1993, two members of a three-member panel of the Superior Court of Pennsylvania set aside the verdict of a jury consisting of twelve (12) citizens of Luzerne County, Pennsylvania and reversed the first degree murder conviction of the Respondent, John Dominick Travis. Travis had been serving a sentence of life imprisonment for the strangulation death of Sharlene Fedor on June 30, 1990. In reversing the Respondent's conviction and ordering his discharge, the Superior Court of Pennsylvania invaded the province of the jury in a manner repugnant to the spirit of Article III, Section 2, of the United States Constitution and held that the evidence was insufficient.

The evidence which the Superior Court of Pennsylvania deemed insufficient established that both the Respondent and the victim were at Rumors Bar during the early morning hours of June 30, 1990. Both the Respondent and the victim left the bar sometime after 3:00 a.m. After leaving Rumors, the Respondent went to Mill Creek. His T-shirt which he had worn that evening was found at a car pull-off area along a roadway abutting Mill Creek, forty feet from the victim's clothing. In addition, a hair follicle identified as consistent with the Respondent's by an F.B.I. expert was found in a puddle of water along the pull-off area. The puddle also contained a piece of the victim's jewelry and was located near her torn clothing. The victim's purse, which was found in the vicinity of her body along Mill Creek, contained a pack of Eve Light cigarettes, marked with a floral design. Three cigarettes were missing from the pack. Three cigarettes with the same floral design were found at

the scene along the roadway where the victim's necklace was discovered. Saliva found on one of the cigarettes was not that of the victim, but of an "A" secretor. The Respondent, who smoked, was an "A" secretor. Also found at the scene was a pair of "Fruit of the Loom" underwear, size 30-32. This underwear was linked to the Respondent through the testimony of several individuals who indicated that the Respondent did wear Fruit of the Loom underwear, size 30-32, and that five pairs of the same size Fruit of the Loom underwear were removed from the Respondent's apartment.

When questioned by police, the Respondent volunteered false versions of the undisputed facts at trial. He initially denied to police that he was at Rumors Bar on the night in question and that he had ever been there or knew where it was. The undisputed record, however, indicates that the Respondent was at Rumors Bar on the night in question and that he had been there before. The Respondent also informed police that he had never been past Vo-Tech School on Jumper Road and that he had never been swimming in Mill Creek off Jumper Road. In fact, he had been past Vo-Tech School on Jumper Road and had been swimming or fishing in Mill Creek on numerous occasions. More importantly, the Respondent went swimming in Mill Creek in the early morning hours of the day of the slaying, after leaving Rumors Bar. The victim's death occurred between 4:00 a.m. and 6:00 a.m. that same morning.

Subsequent to the misapprehension of facts of record in a manner which led two of the three members of the panel of the Superior Court of Pennsylvania to incorrectly conclude that the Commonwealth's evidence was insufficient, the Petitioner filed an Application for Reargument En Banc with the Superior Court of Pennsylvania which was denied on February 25, 1993. Thereafter, the Commonwealth petitioned the Supreme Court of Pennsylvania for discretionary review. Despite the strong public policy which currently exists regarding the protection and safety of citizens

from convicted criminals, the Pennsylvania Supreme Court denied discretionary review. Consequently, this matter has not been reviewed in a manner sufficient to adequately ensure the safety of all citizens before allowing a convicted killer to return to society where he can once again prey on the innocent and unsuspecting. Moreover, the decisions of the state appellate courts clearly permit the invasion of the province of the jury in a manner contrary to the spirit of Article III, Section 2, of the United States Constitution.

## REASONS FOR GRANTING THE WRIT

Review of state court judgments by writ of certiorari is limited in Section 1257 of Title 28 to cases raising a federal question. *See* 28 U.S.C.A. § 1257. Pursuant to Section 1257, this Court has continually held that it will not hear an appeal from a state court "unless a federal question had been both raised and decided in the state court below." *Illinois v. Gates,* 462 U.S. 213, 103 S. Ct. 2317 (1983). The United States Supreme Court has effectively used the limitation of jurisdiction set forth by Congress in Section 1257 to avoid any appeal which does not clearly and unequivocally rest on the decision of a federal question. In doing so, the Court has missed opportunities to become involved in appeals which cry out for further review in order to protect the integrity of the legal system in the United States and to instill confidence in those who are bound by it that justice will be served in all cases.

In apparent conflict with this Court's reluctance to exercise its discretionary review is Supreme Court Rule 10. Rule 10 provides that a petition for a writ of certiorari will be granted only "when there are special and important reasons therefor." Additionally, although the character of reasons identified in Rule 10 illustrate that review of a state court judgment will generally be granted only when a federal question is involved, Rule 10 expressly acknowledges that the character of reasons set forth are "neither controlling nor fully measuring the Court's discretion."

The instant case involves a federal question in that the state appellate courts invaded the province of the jury and replaced a verdict reached by twelve (12) jurors in a criminal case with their own. This action clearly violates the spirit of Article III, Section 2, of the United States Constitution. More importantly, however, this case involves "special and important" public policy reasons for granting the petition for writ of certiorari. Chief among these reasons is the opportunity it affords this Court to further ensure that the citizens of the United States will be protected from convicted criminals.

Over the past several years, a growing and boisterous public policy concern has been raised by the citizens of the United States crying out for protection from criminals. In light of this public policy concern, it is unconscionable for a criminal defendant, convicted by a jury of his peers, to be discharged by two out of three members of a panel of a first level appellate court without the state first receiving either en banc review from the first level appellate court or review from the highest state court. To this end, because of the constitutional protections which are justifiably afforded to criminal defendants, a criminal conviction must not be lightly set aside. Instead, the demand from citizens for greater protection from convicted criminals should be met by affording a state the greatest appellate review possible before releasing a convicted killer, or any other convicted criminal, to once again prey upon society.

Justice must not be blind to the needs of society. Indeed the courts must provide groups of individuals with protections in the same manner in which single individuals are currently protected. To provide otherwise in the case at bar would permit the lower court to set aside the verdict of twelve (12) in a decision by two (2) in a manner which is almost certain to have a significant impact on the public's safety and perception of the legal process. Here, the Court has been provided with a federal question as a basis for

granting the Petitioner's petition for writ of certiorari and a corresponding public policy reason. Accordingly, the Court should grant review. This is especially true when Article III, Section 2, of the United States Constitution places such great weight on the right to a trial by jury, and correspondingly, on that jury's verdict, in the trial of all crimes.

## CONCLUSION

The Petitioner was denied full and effective review of the Pennsylvania Superior Court's panel decision reversing the Respondent's conviction. The lack of full and effective review greatly prejudices the Petitioner and fails to adequately ensure the safety of all citizens. Substituting the panel decision of the Pennsylvania Superior Court for the verdict reached by the jury is also repugnant to Article III, Section 2, of the United States Constitution. Accordingly, federal public policy mandates the grant of the Petitioner's petition for a writ of certiorari.

Respectfully submitted,

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## APPENDIX A — ORDER OF THE SUPREME COURT OF PENNSYLVANIA FILED FEBRUARY 18, 1994

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 90 M.D. Allocatur Docket, 1993

COMMONWEALTH OF PENNSYLVANIA,

Respondent

v.

JOHN DOMINICK TRAVIS,

Petitioner

Petition for Allowance of Appeal from the Superior Court

ORDER

PER CURIAM:

AND NOW, this 14th day of December, 1993, the Petition for Allowance of Appeal is denied. Petition for Writ of Mandamus is denied.

Mr. Justice Larsen did not participate in the decision of this case.

A TRUE AND CORRECT COPY
ATTEST: 02/18/94
s/ Shirley J. Phipps
Asst. Chief Clerk

## APPENDIX B — ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA DATED FEBRUARY 25, 1993

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 03516 Philadelphia, 1991

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN D. TRAVIS,

Appellant

ORDER

The court hereby denies the application filed January 15, 1993, requesting reargument/reconsideration of the decision dated January 5, 1993.

s/ Per Curiam
PER CURIAM

DATE: February 25, 1993

## APPENDIX C — JUDGMENT OF THE SUPERIOR COURT OF PENNSYLVANIA FILED JANUARY 5, 1993

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 3516 Philadelphia, 1991

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN D. TRAVIS,

Appellant

Appeal from the Judgment of Sentence, November 6, 1991, in the Court of Common Pleas of Luzerne County, Criminal Division, No. 2175 of 1990

BEFORE: JOHNSON, FORD ELLIOTT, AND HOFFMAN, JJ.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of LUZERNE County be, and the same is hereby REVERSED AND APPELLANT DISCHARGED.

By the Court:
s/ David A. Szewczak
PROTHONOTARY

Dated: January 5, 1993

## APPENDIX D — MEMORANDUM DECISION OF THE SUPERIOR COURT OF PENNSYLVANIA FILED JANUARY 5, 1993

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 3516 Philadelphia 1991

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN D. TRAVIS,

Appellant

Appeal from the Judgment of Sentence, November 6, 1991, in the Court of Common Pleas of Luzerne County, Criminal Division, No. 2175 of 1990

BEFORE: JOHNSON, FORD ELLIOTT, AND HOFFMAN, JJ.

MEMORANDUM:

John D. Travis was sentenced to life imprisonment after a jury convicted him of First Degree Murder. The charges against Travis arose from the strangulation death of Sharlene Fedor, whose body was discovered on June 30, 1990, floating in a pool of water in Mill Creek, Plains Township. In this appeal, we are asked to review 1) the disposition of Travis' pre-trial suppression motion; 2) the sufficiency and the weight of the evidence; and 3) certain closing remarks made by the prosecution. As we find merit to appellant's sufficiency argument, we reverse.

Appellant argues that, at most, the evidence relied upon by the

Commonwealth establishes nothing more than his presence at the crime scene.

In a prosecution for murder in the first degree the Commonwealth must prove that an intentional killing occurred and that the defendant was the perpetrator.[1] Such proof must rest on sufficient evidence to find guilt beyond a reasonable doubt.

In reviewing a challenge to the sufficiency of the evidence, we must determine "whether, viewing all the evidence admitted at trial, together with all reasonable inferences therefrom, in the light most favorable to the Commonwealth, the trier of fact could have found that each element of the offenses charged was supported by evidence and inferences sufficient in law to prove guilt beyond a reasonable doubt." *Commonwealth v. Jackson*, 506 Pa. 469, 472-473, 485 A.2d 1102, 1103 (1984). "Moreover, it is the province of the trier of fact to pass upon the credibility of witnesses and the weight to be accorded the evidence produced. The factfinder is free to believe all, part or none of the evidence." *Commonwealth v. Tate*, 485 Pa. 180, 182, 401 A.2d 353, 354 (1979). The facts and circumstances established by the Commonwealth "need not be absolutely incompatible with defendant's innocence, but the question of any doubt is for the jury unless the evidence 'be so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances.' " *Commonwealth v. Sullivan*, 472 Pa. 129, 150, 371 A.2d 468, 478 (1977), quoting *Commonwealth v. Libonati*, 346 Pa. 504, 508, 31 A.2d 95, 97 (1943). We also note that the same standard is applicable in cases such as the instant case, where the evidence supporting a conviction was largely "circumstantial rather than direct so long as the combination of the evidence links the accused

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1. 18 Pa. C.S.A. 2501, 2052.

to the crime beyond a reasonable doubt." *Commonwealth v. Feflie*, 398 Pa. Super. 622, 628, 581 A.2d 636, 639 (1990), *appeal denied*, 597 A.2d 1151 (1991).

However, while this standard is applicable equally to direct and circumstantial evidence, extra caution is due when a conviction is based solely on circumstantial evidence.

> [B]ecause of the fact that it is circumstantial and that a grave wrong may be done to an innocent man by reasoning from circumstances not sufficiently cogent in themselves or as connected, and particularly not sufficiently exclusive of every innocent hypothesis, the courts have been very sedulous to prevent an innocent man being found guilty where the evidence does not conform to the acceptable standards.
>
> *Rodriquez v. United States*, 232 F.2d 819, 831 (5th Cir. 1956); cited with approval in *Commonwealth v. Santana*, 460 Pa. 482, 486, 333 A.2d 876, 877 (1975).

*Commonwealth v. Trafford*, 312 Pa. Super. 578, 459 A.2d 373 (1983).

Having set out our standard of review, we now look to the evidence presented by the Commonwealth in support of conviction. Such evidence consists of the following: Both appellant and the victim were at Rumor's Bar during the early

morning hours of June 29-30. They did not arrive together, but rather the victim arrived in the company of another man who paid her admission. Appellant and the victim were not seen together at any time in the bar nor did they leave together although their departures occurred sometime after 3:00 a.m. The victim was seen again after leaving the bar in the parking lot looking for her boyfriend and her shoes. She thereafter entered the bar with another individual, not appellant and not the gentleman she arrived with, and asked for change to use the phone booth. After leaving Rumor's Bar, appellant testified that he went to Mill Creek for a swim. According to several witnesses, Mill Creek was a local, well-frequented swimming hole.[2] The victim's body was found in the creek on the following afternoon. The physical evidence gathered by the police was as follows: Appellant's T-shirt, which he had worn that evening was found at a car pull-off parking area along a roadway abutting Mill Creek, forty feet from the victim's clothing. In addition, a hair follicle was also found in the puddle of water.[3] Expert testimony could not establish conclusively that the hair was appellant's but that it was consistent with his hair. The puddle in the pull-off area also contained a piece of the victim's jewelry. The victim's purse, which was found in the vicinity of her

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2. It is important that, with the exception of the testimony of appellant himself that he went to Mill Creek that night, all other relevant testimony referenced was that of Commonwealth witnesses.

3. We are aware that in the midst of trial (ten days had passed) the Commonwealth sought to offer testimony from an FBI expert to the effect that some hairs found on the defendant's T-shirt were consistent with the victim's. The initial report, disclosed prior to trial and prepared by the same expert, only established that some hairs found were consistent with the defendant's. The trial court excluded the testimony. There was also some testimony from an investigating officer that a pair of Fruit of the Loom underwear, size 32-34, was discovered at the scene. However, the Commonwealth failed to link the underwear with the defendant and does not rely upon this piece of evidence as supportive of the verdict.

body along Mill Creek, contained a pack of Eve Light cigarettes, marked with a floral design. Three cigarettes were missing from the pack. Three cigarettes with a floral design were found along the roadway where the victim's necklace was discovered. There was no testimony which established that the three cigarettes found at the scene were the same Eve brand or when they had been smoked. Saliva found on one of the cigarettes was not that of the victim but of an "A" secreter. Appellant was an "A" secreter. Expert testimony could not determine how long the saliva had been on the cigarette; whether the saliva came from a man or a woman; or whether the person was white or black. The expert could not testify that the saliva was that of appellant, but only that 32% of the white population are "A" secreters. At the time of initial questioning regarding his whereabouts on the night of the murder, appellant denied being at Rumor's Bar or at Mill Creek.

Taking this evidence as a whole and viewing it in the light most favorable to the Commonwealth, the only facts the Commonwealth clearly "proved" were that appellant was at Rumor's Bar and at the crime scene on the night of the murder. These are facts not in dispute by appellant.[4] However, in order to convict appellant of the crime of murder beyond a reasonable doubt the jury was left to "infer" that appellant met up with the victim in the parking lot of Rumor's Bar, drove the victim to Mill Creek (a search of appellant's car revealed no physical evidence whatever), was the person who smoked a cigarette which may or may not have been one of the victim's cigarettes, removed or forcibly removed the victim's clothing, strangled the victim, and then deposited her body in the water. Such inferences do not spring

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4. Our sufficiency review must necessarily concentrate on the Commonwealth's evidence. By referencing appellant's testimony, we may not judge its credibility but rather rely upon its content to the extent that the Commonwealth does.

from the evidence presented by the Commonwealth but rather amount to speculation and conjecture as to what might have occurred in the early morning hours of June 30th.

Using the appropriate standard of review, we must be confident that each element of the offense was supported by the evidence and that appellant's guilt was proven beyond a reasonable doubt. *Commonwealth v. Jackson,* 506 Pa. 469, 485 A.2d 1102 (1984).

While circumstantial evidence can support a conviction for first-degree murder, that evidence must do more than demonstrate the accused's presence at the crime scene. It must substantially link an accused to the crime itself. *Commonwealth v. Holcomb,* 508 Pa. 425, 498 A.2d 833 (1985), *cert. denied, Holcomb v. Pennsylvania,* 475 U.S. 1150 (1986). Instantly, the facts presented fail to meet this requirement. While the jury is free to weigh, accept, and reject any evidence in arriving at its verdict, it may not render a verdict based on, at most, suspicion or conjecture.

> It must be remembered that guilt must be proved and not conjectured. The reasonable inference of guilt must be based on facts and conditions proved; it cannot rest solely on suspicion or surmise. These do not take the place of testimony * * * The circumstantial evidence in this case is not such 'as reasonably and naturally to justify an inference of the guilt of the accused * * * and of such volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt.'

*Commonwealth v. Clinton,* 391 Pa. 212, __, 137 A.2d 463, 466

(1958), *quoting Commonwealth v. Bausewine,* 354 Pa. 35, 41, 46 A.2d 491, 493 (1946); *Commonwealth v. Dalton,* 199 Pa. Super. 388, 185 A.2d 653 (1962).

The Commonwealth relies on *Commonwealth v. Holcomb, supra,* to support its sufficiency argument. The *Holcomb* decision did in fact uphold a murder conviction based solely on circumstantial evidence. However, we find the *Holcomb* case distinguishable as to the quality and quantity of the circumstantial evidence and as to the inferences which a jury might reasonably draw therefrom. We also find the careful and painstaking analysis utilized by the supreme court in assessing the circumstantial evidence to be instructive and supportive of our determination herein.

> Viewing the evidence in the light most favorable to the Commonwealth and drawing, as we must, all such logical inferences from it, the evidence is sufficient to support a finding of guilt on the murder charge. Considering the evidence in that light, the following facts appear from the record. The victim was last seen at a shopping center around 6:15 p.m. on Saturday, January 16, 1982. The appellant was seen around 6:10 or 6:15 p.m. the same day at a beer distributorship adjoining the store outside of which the victim was waiting for her friend. The car the victim had occupied was found miles away from the shopping center the next day with her body nearby, although the car itself was first seen there about 9:30 on that same Saturday night. Its interior was burned, and the heat had stopped the victim's watch at 7:57 p.m.

*Appendix D*

January 16, 1982, was one of the coldest days of that year in Beaver County, with temperatures many degrees below 0 [degrees]. Between 8:00 and 8:30 p.m. that frigid evening, the appellant appeared on foot at a house about one mile from where the victim's body was found. He was suffering from the cold and stated that he had been walking outside for a long time. He was not dressed for a walk in that weather. When he came inside, he asked the residents of the house if there were any scratches or blood on him. After warming himself, he was driven at his request to a convenience store beyond the mall where the victim had last been seen alive and where appellant's car remained. From there, he called a relative who took him to his own car at the mall where the abduction took place.

In talking to the police, appellant gave them several different false versions of his activities at the time of the crime. This appellant gave four different false accounts of his activities on Saturday, January 16, 1982, in an effort to create an alibi. During questioning at the police station he initially stated that he was at a bar in Industry, from 11:00 a.m. to 11:00 p.m. that day. Later, when he knew that the police had contradictory information, he stated that he had left the bar for a short time and had come back at 10:00 p.m. Soon after that, he stated that he was first in a bar in Homewood about noon where he had met two

persons named Jeff and Bill. He then stated he went to Industry at 2:00 p.m., that Jeff and Bill met him there around 5:00 or 5:30 p.m., and they all left, going to several places in Ohio and Pennsylvania. While they were driving they argued, and he left the car travelling on foot to the Tice residence. Finally, after his arrest, appellant told the Chief of Police that everything said earlier was wrong, that in fact he was with a married woman all day, and he had left her car to walk to the Tice house. Eyewitness testimony shows that appellant was in Industry until 4:00 p.m., in Monaca until about 6:00 p.m., and was next seen at the Tice residence soon after 8:00 p.m.

. . .

This Court has stated that mere presence at the scene of a crime is not sufficient to support a guilty verdict. The evidence introduced by the Commonwealth does not go solely to presence. Appellant's question about whether there was any blood on his jacket does not establish mere presence; it allows the jury to infer, when viewed in favor of the Commonwealth, that he was at the scene and participated in the killing. The fact that appellant gave several inconsistent versions of his activities that day indicates not that he was in the car but, rather, that there was some attempt to hide his true whereabouts. These

facts are evidence beyond mere presence at the time of the crime and support the jury verdict of first-degree murder.

From all these circumstances a jury could have first inferred beyond a reasonable doubt that the appellant was present when Sandra Vespaziani was raped and killed. From his statements, both what was and was not said by him at the farmhouse to which he walked and sought shelter shortly after the crime, that same jury could infer beyond a reasonable doubt that he brutally raped and killed her. Although the evidence established that he was present at the scene of the crime he falsely stated to the people in the farmhouse that he had been thrown out of a car by some drinking buddies. Since he was present at the scene, his failure to mention anything about it, the burnt car, the body or any other fact concerning the crime, is inexplicable and as such forms another basis for an inference of guilt. This inference is strengthened by his later lies to the police in an effort to establish an alibi. On such evidence the jury's finding that he had committed the crime must stand.

*Commonwealth v. Holcomb*, __ Pa. __, __, 498 A.2d 833, 845-847 (1985) (citations omitted).

Clearly, the inferences which the jury was permitted to make in *Holcomb* logically flowed from the factual evidence presented

and linked the defendant not just with the scene of the crime but with the crime itself.[5]

As in *Holcomb*, the Commonwealth would also rely on appellant's contradictory statements to the police during initial interrogation as evidence of guilt. Approximately two weeks after the murder, appellant was served at work with a *capias* warrant. The warrant had been issued on July 6 for appellant's failure to appear on June 29th for an arraignment on a DUI charge. Appellant was informed of the nature of the warrant, Mirandized, and taken to the police station. Upon being questioned regarding his whereabouts on the evening of June 29th, appellant asked the officers what it was all about and was told that they were investigating a murder. Thereafter, in response to questions about whether he had ever been in Rumor's Bar or swimming at Mill Creek, appellant denied both. His contradictory responses were admitted at trial.[6] Thereafter, appellant testified to being scared when informed of the nature of the investigation and responding "no" to all the questions the police posed. While we agree with the Commonwealth that such inconsistent statements can be admissible to show an attempt to conceal the truth,[7] such

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5. *Commonwealth v. Gorby*, 527 Pa. 98, 588 A.2d 902 (1991) (not only was appellant last person seen with the victim, he thereafter was seen in possession of victim's wallet and belt and confessed crime to appellant's girlfriend).

6. These statements are the subject of the suppression issue presented on appeal. Because of our disposition on sufficiency, we need not address this question

7. In *Holcomb*, the court found that the defendant's numerous false versions of his whereabouts at the time of the murder in an effort to establish an alibi was evidence from which the jury could infer concealment. Clearly, the false responses given by appellant did not attempt to establish an alibi.

statements cannot be sustained as a substitute for proof. As set out in *Commonwealth v. Trafford, supra:*

> At best, the Commonwealth's evidence supports a conclusion that appellant lied about where he was when he was notified of the fire and that he was at or near the scene of the fire when it was started. Appellant's presence at the scene of the fire is certainly insufficient to establish guilt. Nor is the added factor of his apparently false statements as to his whereabouts sufficient to establish a prima facie case. 'A man charged with crime is not required to explain anything. It is the Commonwealth's obligation to prove guilt. . . . [I]f the defendant does speak and speaks unconvincingly or self- contradictorily, but the Commonwealth has not made out a prima facie case, a resulting conviction will not be allowed to stand.' The Commonwealth can not use apparent inconsistencies in the appellant's version of the events surrounding the fire to make up for deficiencies in its own case. Of course, appellant's deceptions would lead one to suspect that perhaps mischief was afoot, but his willingness to mislead provides no basis in logic for concluding that he engaged in the deliberate felonious act of arson. While the evidence in the instant case may have cast a degree of suspicion on appellant, it is clear that 'suspicion is never accepted in a court of justice as a substitute for proof.' We believe that too much has been left to conjecture in the instant

> case and therefore conclude that we cannot permit the conviction to stand.

*Id.* at __, 459 A.2d at 375 (citations omitted).

Finding the evidence insufficient to support appellant's conviction, we reverse and discharge.

Judgment of sentence reversed and appellant ordered discharged.

Johnson, J. files a Dissenting Memorandum.

## APPENDIX E — DISSENTING MEMORANDUM BY JOHNSON, J. FILED JANUARY 5, 1993

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 3516 Philadelphia, 1991

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN D. TRAVIS,

Appellant

Appeal from the Judgment of Sentence entered November 6, 1991, Court of Common Pleas, Luzerne County, Criminal Division at No. 2175 of 1990.

BEFORE: JOHNSON, FORD ELLIOTT and HOFFMAN, JJ.

DISSENTING MEMORANDUM BY JOHNSON, J.

While I would concede that the question of the sufficiency of the evidence in this case is close, I must respectfully dissent. The thrust of John D. Travis' argument is that the evidence only establishes his presence at the scene of the crime. I would disagree.

I agree with my distinguished colleagues as to the proper standard for review. Applying that standard, I conclude that the Commonwealth's evidence was legally sufficient to support a finding that Travis had committed the murder of Sharlene Fedor. The evidence at trial established that both Travis and the victim were at Rumors Bar during the early morning hours of June 30. Both Travis and the victim left the bar sometime after 3:00 a.m.

*Appendix E*

After leaving Rumors, Travis went to Mill Creek. His T-shirt, which he had worn that evening was found at a car pull-off area along a roadway abutting Mill Creek, forty feet from the victim's clothing. In addition, a hair follicle, consistent with that of Travis', was found in a puddle of water along the pull-off area. The puddle also contained a piece of the victim's jewelry. The victim's purse, which was found in the vicinity of her body along Mill Creek, contained a pack of Eve Light cigarettes, marked with a floral design. Three cigarettes were missing from the pack. Three cigarettes with a floral design were found along the roadway where the victim's necklace was discovered. Saliva found on one of the cigarettes was not that of the victim but of an "A" secreter. Travis, who smoked, was an "A" secreter.

When questioned by police, Travis volunteered false versions of the undisputed facts at trial. He initially denied to police that he was at Rumors Bar on the night in question and that he had ever been there or knew where it was. Travis was at Rumors Bar on the night in question and had been there before. Travis also informed police that he had never been past Vo-Tech School on Jumper Road and that he had never been swimming in Mill Creek off Jumper Road. In fact, he had been past Vo-Tech School and had been swimming or fishing in Mill Creek on numerous occasions. Travis was swimming in Mill Creek in the early morning hours of the day of the slaying, after leaving Rumors Bar. The victim's death occurred between 4:00 a.m. and 6:00 a.m. the same morning.

Thus, while no single item of evidence proves guilt, I am satisfied that the evidence as a whole does provide a basis sufficient to sustain the jury's verdict. *Commonwealth v. Holcomb,* 508 Pa. 425, 498 A.2d 833 (1985), *U.S. cert. denied,* 475 U.S. 1150, 106 S.Ct. 1804. The fabrication of false and contradictory statements by an accused is an additional circumstance which militates against the accused, but is not sufficient alone to prove

guilt. *Commonwealth v. Woong Knee New,* 354 Pa. 188, 47 A.2d 450, 460 (1946); *Commonwealth v. Pickney,* 194 Pa.Super. 371, 168 A.2d 922, 924 (1961) (fabrication of false and contradictory accounts is a circumstance always indicatory of guilt).

I conclude that Travis' sufficiency argument does not, by itself, warrant a reversal of the judgment of sentence. Therefore, I will consider the other contentions raised in the Brief of Appellant.

Travis also contends that his conviction is against the weight of the evidence. "A motion for new trial on grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict but contends, nevertheless, that the verdict is against the weight of the evidence." *Commonwealth v. Taylor,* 324 Pa.Super. 420, 425, 471 A.2d 1228, 1230 (1984). The decision whether or not to grant a new trial on this basis rests within the sound discretion of the trial court. *Commonwealth v. Akers,* 392 Pa.Super. 170, 182, 572 A.2d 746, 752 (1990). "A trial court should award a new trial on the ground that the verdict is against the weight of the evidence only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." *Commonwealth v. Whitney,* 511 Pa. 232, 239, 512 A.2d 1152, 1155-1156 (1986). The role of an appellate court in reviewing the weight of the evidence is very limited. *Commonwealth v. Purcell,* 403 Pa.Super. 342, 348-349, 589 A.2d 217, 220 (1991). "The purpose of that review is to determine whether the trial court abused its discretion and not to substitute [the reviewing] Court's judgment for that of the trial court." *Commonwealth v. Murray,* 408 Pa.Super. 435, 440, 597 A.2d 111, 114 (1991) (en banc). Contrary to Travis' suggestion, this Court may not re-evaluate the credibility of the witnesses who testified at trial. *See, Id.* at 440, 597 A.2d at 114.

Under this standard, I am not persuaded that the evidence in this case preponderates against the verdict or that there is any indication that a miscarriage of justice may have occurred. Moreover, the trial court which was present to hear the testimony and demeanor of the witnesses, concluded that the jury's verdict was not so contrary to the evidence that it shocked the court's sense of justice.

Travis separately argues that the suppression court erred in refusing to suppress "certain inconsistent statements" he made during a custodial interview concerning his whereabouts on June 29-30. Appellant's Brief at 7. Although Travis does not specify the precise statements challenged, he contends that his *Miranda* waiver was not knowing, intelligent or voluntary because he was not made aware of the general nature of the crime giving rise to the investigation. Initially, I note several flaws in the presentation of Travis' argument. First, I am unable to ascertain, from a review of the suppression hearing transcript, which statements Travis sought to suppress. I conclude, however, from a review of the trial transcript, that the Commonwealth introduced certain statements made by Travis during the interview which, at trial, had been proven false. Specifically, Travis initially denied ever having been at Rumors Bar, swimming in Mill Creek, and having worked for B & E Remodeling Company. N.T., January 14-25, 1991, at 479-480. Without explanation, Travis merely asserts that these statements were "inculpatory." Appellant's Brief at 23. Because appellant's brief is completely devoid of an explanation in this regard, we can only surmise that Travis' pre-trial motion to suppress these "inconsistent" statements was premised on a potential attack upon his credibility at trial.

Nevertheless, I will address the argument that Travis did not effectuate a knowing and intelligent waiver of his Fifth

Amendment rights, because at the time he executed the *Miranda* waiver, he was not made aware of the crime under investigation. Guided by this court's recent decision in *Commonwealth v. Carr,* 398 Pa.Super. 306, 580 A.2d 1362 (1990), *appeal denied,* 592 A.2d 42, I would be constrained to hold otherwise.

Regarding the initial ruling of the suppression court, our standard of review is limited to determining whether the factual findings of the lower court are supported by the record and whether the legal conclusions drawn from those facts are in error. *Commonwealth v. Rodgers,* 413 Pa.Super. 498, 516, 605 A.2d 1228, 1237 (1992). In making this determination, we consider only the evidence of the prosecution's witnesses and so much of the evidence for the defense, as, fairly read in the context of the record as a whole, remains uncontradicted. If, when so viewed, the evidence supports the factual findings, we are bound by such findings and may only reverse if the legal conclusions drawn therefrom are in error. *Id.* at 517, 605 A.2d at 1237-1238.

As a preliminary matter, I note that the suppression court failed to make findings of fact or conclusions of law as required by Pa.R.Crim.P. 323(i). This court and our Supreme Court have expressly disapproved of this practice and have, when necessary, vacated judgment of sentence and remanded for a new suppression hearing. *See e.g. Commonwealth v. DeSantis,* 337 Pa.Super. 70, 486 A.2d 484 (1984). Where possible, however, we have consulted the record directly to determine the propriety of suppression orders in these situations. *Commonwealth v. Haynes,* 395 Pa.Super. 322, 577 A.2d 564 (1990). Here, one can gleen the trial court's findings of fact from its resolution of post-trial motions, as well as its pronouncements during the suppression hearing. Therefore, I will address the disposition of Travis' pre-trial suppression motion. *See Commonwealth v. Gelber,* 406 Pa.Super. 382, 394, 594 A.2d 672, 678 (1991).

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According to the testimony presented at the suppression hearing, Officer Gary Sworen went to Travis' place of employment at approximately 4:00 p.m. on July 12th, to serve upon him a capias warrant. N.T., January 14, 1991, at 5. The capias warrant was issued for Travis on July 6th for his failure to appear before the court on June 29th for arraignment on a DUI charge. *Id.* at 6. Officer Sworen identified himself, informed Travis that the capias warrant was issued for his failure to appear for arraignment, placed Travis in the State Police vehicle, and advised Travis of his *Miranda* warnings. *Id.* at 7. Chief of Police of Luzerne County, John Timko, then got into the vehicle and advised Travis that he wanted to "talk to him concerning an incident that occurred in Plains Township." *Id.* at 9. At that time, while seated in the police vehicle, Travis was again advised of his *Miranda* warnings. *Id.*

Upon arrival at the Plains Township Police Department, Chief Timko again read Travis his *Miranda* warnings. *Id.* at 11. Travis signed a rights waiver card which was provided by Chief Timko and acknowledged an understanding of his rights. *Id.* at 12. At that point, Chief Timko began asking Travis questions "concerning an incident which occurred on the 29th of June 1990." *Id.* at 13. Specifically, Chief Timko asked Travis where he was on the day of the 29th. Travis replied that he had been working, and after work, he went to the Poplar Inn and remained there with his girl friend until around midnight. *Id.* at 14. Travis then asked Chief Timko "what is this about?" Chief Timko said it was about a homicide. *Id.* at 14-15. Chief Timko then continued to ask Travis questions and he continued answering.

In *Carr,* citing to *Commonwealth v. Richman,* 458 Pa. 167, 320 A.2d 351 (1974), and *Commonwealth v. Dixon,* 475 Pa. 17, 22-23, 379 A.2d 553, 556 (1977), we reiterated the well known standard for proving a knowing and intelligent waiver of a suspect's Miranda rights:

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> [A] valid waiver of *Miranda* rights requires that the suspect have an awareness of the *general nature* of the transaction giving rise to the investigation. The rationale of this holding was that it is only when such knowledge is possessed by a suspect that he can be said to understand the consequences of yielding the right to counsel. "It is a far different thing to forego a lawyer where a traffic offense is involved than to waive counsel where first degree murder is at stake." It is clear from *Richman,* however, that the suspect need not have knowledge of the "technicalities" of the criminal offense involved; rather, it is necessary only that he be aware of the "transaction" involved.

*Carr, supra,* at 312, 580 A.2d at 1365 (citations omitted) (emphasis added).

In *Carr,* following the murder of a woman along the Appalachian Trail, the defendant was arrested and taken into custody on a fugitive warrant from the State of Florida. While in custody, the defendant made statements which implicated himself in the murder. Appealing to our court, the defendant argued that the trial court erred when it refused to suppress his incriminatory statements because, following his arrest on a fugitive warrant, he did not know that he was to be questioned about the shooting death of a woman. *Id.* at 312, 580 A.2d at 1365. Our court, affirming the trial court's refusal to suppress the statements on that ground, held that the defendant's waiver of his right to remain silent was not involuntary despite the defendant's contention that he did not know he was being questioned about the murder. The

circumstances attending the interrogation established that after being arrested, the defendant was questioned almost exclusively about the shooting and not about his fugitive status in Florida. Moreover, the defendant, himself, after arraignment, admitted that he had known they were looking for him because he had heard that they were showing his picture to people on May 17. *Id.* at 314, 580 A.2d at 1366. In *Carr,* given those circumstances, it was clear that the defendant was aware of the general nature of the transaction giving rise to the investigation.

Similarly, in present case, the officers arrested Travis on a capias warrant. After explaining the particulars of his arrest, the officers informed Travis that they wanted to question him about "something that occurred in Plains Township," i.e., about something other than the capias warrant. Travis was then given his *Miranda* warnings a second time and taken to the police station. After being given his *Miranda* warnings a third time, Travis signed a waiver form. Moments later, Chief Timko questioned Travis of his whereabouts on June 29th. When Travis asked "what is this all about?" he was informed that the questions were in regard to a homicide which occurred in Plains Township on June 29th. At that time, Travis continued answering questions. Travis later sought to suppress these oral statements alleging that he was unaware of the nature of the crime about which he was being questioned. The record, however, establishes that he was well aware of the general nature of the transaction giving rise to the investigation *before* he answered Chief Timko's questions concerning, *inter alia,* his whereabouts on the night of the murder. At trial, Travis testified as follows:

> Q. And with regard to the additional questions that were asked of you of your whereabouts that evening, what was the nature of your responses?

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A. No.

Q. In other words, you said, no, to their questions?

A. All of them.

Q. Why was that?

A. They just told me that I killed somebody. And like I said, I was scared. I just disassociated like, get me the hell out of here. You know, I just, everything they asked me I just said no to.

* * *

Q. So then after Chief Timko made this remark to you, to all of the questions that they asked of you you gave them incorrect information?

A. Yepper.

Q. If you gave incorrect information to Chief Timko at that point in time, why would you not now give incorrect information to the Court and the jury?

A. Then I was just — they came right out and told me that I killed somebody. And like I said, it blew me away. I was scared shitless. I just denied everything.

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N.T., January 14-25, 1991, at 812-814.

Given these circumstances, and in accordance with our holding in *Carr,* I conclude that Travis was aware that the police were questioning him about a murder that had taken place on June 29th in Plains Township, and thus, waived his *Miranda* rights with a full understanding on his part.

Finally, Travis argues that the trial court erred in permitting prosecutorial misconduct during closing argument. Specifically, Travis argues that the trial court improperly permitted the prosecutor to argue to the jury that "the defendant was in the parking area with the woman who had no visible ride, takes her to the area where she was subsequently murdered." N.T. at 963. Travis asserts, without further explanation, that through these particular comments, the Commonwealth was able to submit to the jury that it could infer a specific intent to kill.

First, I cannot agree with Travis' assessment that the jury was permitted to "infer a specific intent to kill" based merely upon the prosecutor's remarks quoted by Travis. Travis does not explain, nor can I fathom, how the jury could infer a specific intent to kill, based on the prosecutor's suggestion, without more, that Travis transported the victim to Mill Creek. Nevertheless, I will address the issue of whether the statements made by the Commonwealth's attorney in closing argument constituted impermissible prosecutorial misconduct.

It is well established that a prosecutor must have reasonable latitude in arguing a case to the jury. *Commonwealth v. Sargent,* 349 Pa.Super. 289, 503 A.2d 3 (1986). In general the prosecutor is entitled to argue any legitimate inferences which arise from the evidence and must be free to present his or her argument with

"logical force and vigor." *Commonwealth v. Blount,* 387 Pa.Super. 603, 614, 564 A.2d 952, 957 (1989). Moreover, allegedly improper comments in closing arguments must be evaluated in their full context, including the defense closing. *Commonwealth v. Frazier,* 331 Pa.Super. 128, 480 A.2d 276 (1984). Whether the prosecutor's remarks are prejudicial is a question for the trial judge whose determination will not be overturned absent an abuse of discretion. *Commonwealth v. D'Amato,* 514 Pa. 471, 526 A.2d 300 (1987).

In the present case, the prosecutor properly discussed the evidence and suggested a reasonable inference to be drawn from the evidence. Evidence was introduced at trial which showed that both Travis and the victim were at Rumors Bar until after 3:00 a.m. on June 30; the victim did not have a ride and was attempting to locate her car; the victim's body was found in Mill Creek on June 30; and that Travis had driven to Mill Creek during the early morning hours of June 30. Based on this evidence, it certainly could be deduced, as a logical inference, that Travis transported the victim to Mill Creek. *See Frazier, supra.* I therefore would reject this claim of error.

Based upon the foregoing, I conclude that each of Travis' arguments are without merit. Accordingly, I would affirm the judgment of sentence. Hence, this dissent.

## APPENDIX F — DECISION AND ORDER OF THE COURT OF COMMON PLEAS OF LUZERNE COUNTY DATED JULY 11, 1991

IN THE COURT OF COMMON PLEAS
OF LUZERNE COUNTY

CRIMINAL
NO. 2175 of 1990
Before: Brominski, J.

COMMONWEALTH OF PENNSYLVANIA

vs.

JOHN DOMINIC TRAVIS

DECISION

This matter comes before the Court upon Defendant's Post Trial Motion following a trial by jury which convicted him of first degree murder.

Defendant's first reason for a new trial is that the Court erred in failing to grant his Motion to Suppress his oral statements in that:

> "(a) the Commonwealth, at the time the Defendant was read his *Miranda* rights during a custodial interrogation, failed to inform the Defendant of the nature of the incident thereby rendering any waiver of *Miranda* invalid as not being intelligently and knowingly effected."

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Most of the facts relevant to the Defendant's Motion are set forth in the Defendant's Brief:

> "On July 12, 1990, the police arrested the Defendant at his place of employment when he was leaving work at the end of his shift. (N.T. 5-7). The arrest was predicated on a capias warrant issued on July 6 by Judge Bernard J. Podcasy of the Court of Common Pleas of Luzerne County due to Defendant's failure to appear in County Court on June 29, 1990 for a scheduled arraignment on an unrelated DUI charge. (N.T.6, Cmwlth. Ex. 1-S). When the capias warrant was secured by the Commonwealth on July 6, 1990, the Defendant was already a suspect in the Sharlene Fedor homicide investigation, was under surveillance by the police, and it was the Commonwealth's intent to use the capias as a means of questioning the Defendant about Sharlene Fedor's death. (N.T. 19, 20, 22-23). When Defendant was initially placed under arrest and while being transported to the police station, the police, on both occasions, read Defendant his Miranda warnings after advising him that his arrest on the capias warrant was due to his failure to appear for arraignment on June 29. (N.T. 7-9). In each instance, the Defendant never explicitly waived his Miranda rights nor did he make any attempt to flee. (N.T. 7-9). The Defendant was then transported to the police station despite a notation on the capias warrant which directed that upon

apprehension that the Defendant be immediately brought before Judge Cappellini of the Court of Common Pleas of Luzerne County. (N.T. 11). During the Defendant's transport to the police station, the police told Defendant that they wanted 'to talk to you (Defendant) about something that happened in Plains . . .' (N.T. 10). At the police station, the Defendant was again read his Miranda warnings and signed a Miranda waiver form. (N.T. 11-13, Cmwlth. Ex. 2-S) after the Defendant signed the waiver form, the police began interrogating the Defendant about the death of Sharlene Fedor and the Defendant's whereabouts on the evening of her death. (N.T. 13-15). After eight questions being posed to the Defendant regarding his whereabouts on the night of Sharlene Fedor's death, the Defendant then asked the question, 'What's this all about?', to which the police simply responded, 'Murder'. (N.T. 25-26). Subsequent to the police response, the Defendant was not readvised of his Miranda warnings. (N.T. 26). During the entire period of the custodial interrogation, the police acknowledged that they *never* advised the Defendant that they were questioning him about the death of Sharlene Fedor nor does the Miranda waiver form executed by Defendant make any reference to the death of Sharlene Fedor. (N.T. 29-30, 31 Lines 5-8, Cmwlth. Ex. #2). As a result of the interrogation, the police secured certain inconsistent statements from the

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Defendant concerning his whereabouts on June 29-30 which were used at time of trial. (N.T. 13-15, 478-80).

"The Trial Court denied Defendant's suppression motion concluding that, (1) the Defendant never told the police he did not want to be questioned, (2) the Defendant had signed a Miranda waiver form before questioning, and (3) a knowing and intelligent waiver of Defendant's Miranda rights was therefore effected. (N.T. 53-54)."

One other fact should be added. On page 16 N.T., the following question was asked and answered:

"From the time you picked Mr. Travis up on the capias throughout the entire hour and approximately 35 minutes, did he at any point in time ask that you stop questioning him or ask for counsel?

"A. No, no, he did not."

*Com. v. Dixon,* 379 A.2d 553, states that the Commonwealth must prove by a preponderance of the evidence that the Defendant knew of the occasion for the interrogation.

In the matter, sub judice, although the Commonwealth apprehended the Defendant on a capias on an unrelated matter to the homicide, they did prove that the Chief of Police of Plains wanted to talk about something that happened in Plains on June 29, 1990, and that it was about "murder" seems to comport with one of

the most recent cases on this subject, to wit, *Com. v. Carr,* 580 A.2d 1362, wherein it is stated at page 1365:

> "Appellant also contends that his waiver of the right to remain silent following arrest on a fugitive warrant was involuntary because he did not know that he was to be questioned about the shooting of Brenner and Wight. Therefore, he argues, the trial court erred when it refused to suppress his incriminatory statements.
>
> In *Commonwealth v. Richman,* 458 Pa. 167, 320 A.2d 351 (1974), [the Supreme] Court held that a valid waiver of *Miranda* rights requires that the suspect have an awareness of the general nature of the transaction giving rise to the investigation. The rationale of this holding was that it is only when such knowledge is possessed by a suspect that he can be said to understand the consequences of yielding the right to counsel. 'It is a far different thing to forego a lawyer where a traffic offense is involved than to waive counsel where first degree murder is at stake,' *Commonwealth v. Collins,* 436 Pa. 114, 121, 259 A.2d 160, 163 (1969) (plurality opinion). *It is clear from Richman, however, that the suspect need not have knowledge of the 'technicalities' of the criminal offense involved; rather, it is necessary only that he be aware of the 'transaction' involved.* (CITATIONS OMITTED.) Neither does the *Richman* holding establish a 'fifth *Miranda* warning';

> that is, there is no prophylactic requirement that the interrogating officers affirmatively provide information to the suspect as to the crime under investigation. (CITATIONS OMITTED.) Where, however, the defendant has not been furnished with such information and a pre-trial challenge concerning the validity of a confession is made on this ground, the Commonwealth must prove by a preponderance of the evidence that the defendant knew of the occasion for the interrogation. (CITATIONS OMITTED.) This burden may sometimes be satisfied by the establishment of circumstances attending the interrogation, such as the prior statements of the suspect, see *Commonwealth v. Cooper, supra,* or the fact that interrogation follows hard upon the criminal episode and there is no circumstance lending *ambiguity to the direction and purpose of the questioning.*
>
> (Emphasis supplied.)

We find no ambiguity here and hence, no error.

The second reason advanced for a new trial is that the Trial Court erred in denying Defendant's objection to the prejudicial remarks of the Commonwealth made during closing argument:

> "(a) allegations that Defendant transported Sharlene Fedor from Rumor's Bar to Mill Creek which constituted mere speculation and conjecture and was not

supported by any evidence or reasonable inferences therefrom;

"(b) the allegation that the Defendant carried the body of Sharlene Fedor from the 'pull off' area by Mill Creek to the pool of water where the body was located which constituted mere speculation not being supported by the evidence or any reasonable inference therefrom."

The Notes of Testimony on page 963 and 964 recall the closing remarks to the jury by Jerome Cohen, Esq.:

"I submit to you at 3:00, quarter after 3:00, 3:30, the Defendant in the parking area with a woman who had no visible ride, takes her to the area for one purpose alone.

* * *

MR. FLORA: Objection.

THE COURT: What is the objection?

MR. FLORA: There has been no evidence to show that he took her from Rumors Bar to that area.

MR. COHEN: The fact of the times are in evidence.

THE COURT: Go ahead. For the record the objection is overruled.

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* * *

> MR. COHEN: You can infer from the evidence submitted that he took her up there. That the intent to kill can be in a short time. You don't need, for first degree murder you need willful, intentional, and deliberate; does not have to be a day long plan."

What is the evidence from which the jury may infer that the Defendant transported the victim to the scene of the homicide?

The Commonwealth contends that the undisputed testimony reveals that both the Defendant and the victim were at Rumors Bar until after 3:00 A.M. on June 30, 1990. That the victim did not have a ride and was attempting to locate her car. That the victim's body was found in Mill Creek on June 30, 1990, at about 2:00 P.M. That the Defendant was at Mill Creek on June 30, 1990 in the earlier morning after leaving the Rumors Bar and that his shirt was located on Jumper Road, the road adjoining Mill Creek, 40 feet from the victim's torn clothing.

The Defendant argues that the matter is controlled by *Com. v. Revty,* 448 Pa. 512 and *Com. v. Shain,* 426 A.2d 589.

*Revty* had to do with an honorable discharge pin in the buttonhole of defendant's suit coat, and the District Attorney commented in his closing address to the jury that the Defendant was attempting to deliberately deceive the jury by suggesting that he was honorably discharged from the service. This is not the case here. Again, in *Shain,* the court stated on page 593:

> "This theory of a sexually frustrated

> assailant attempting to find release by a homosexual encounter with the victim and thereby causing his death was purely speculation on the prosecutor without an iota of support in the record. The prejudicial and inflammatory character of this argument is evident."

Again, this is not the case in the matter sub judice.

Here the tenor of the Assistant District Attorney's remarks was that you could infer from certain facts and nothing more.

For this reason, this motion for a new trial must be denied.

The last reason for a new trial and or a Motion in Arrest of Judgment is that the evidence is insufficient to sustain the verdict, as the Commonwealth failed to prove beyond a reasonable doubt that (a) the Defendant killed Sharlene Fedor and (b) that the killing was premeditated.

The Defendant properly provides the law on the matter on page 14 of his Brief:

> "The test of the sufficiency of the evidence is whether, viewing the evidence in a light most favorable to the Commonwealth and drawing all reasonable inferences favorable to the Commonwealth, there is sufficient evidence to find every element of the crime beyond a reasonable doubt. *Cmwlth. v. Caldwell,* __ Pa. Super. __, 515 A.2d 311 (1986). When such evidence is insufficient to sustain the verdict,

an arrest of judgment shall be entered. This standard of review is to be distinguished, however, from a claim that the evidence only marginally supports the verdict, thus warranting a new trial. Under this latter review, the standard to be applied is whether the verdict is so contrary to the evidence as to make the award of a new trial imperative because the verdict shocks ones sense of justice, thus giving right another opportunity to prevail. *Cmwlth. v. Haynes,* __ Pa. Super. __, 577 A.2d 564 (1990); *Cmwlth. v. Karenbauer,* 393 Pa. Super. 491, 574 A.2d 716 (1990).

The Defendant then argues, on page 14:

"The circumstantial evidence of record to be evaluated under either standard of review is summarized as follows:

"On the evening of June 29, 1990, the Defendant arrived at Rumor's Bar in Plains Township at approximately 11:30 p.m. where he remained until approximately 3:30 a.m. on June 30; he was wearing a blue T-shirt with white lettering 'B&E Remodeling' inscribed thereon; that between the hours of approximately 12:30 a.m. and 2:45 a.m. on June 30, Sharlene Fedor was seen in Rumors Bar and the adjoining parking lot; that at approximately 1:30 p.m., the body of Sharlene Fedor was discovered by some people floating in a pool of water, 213 feet down Mill Creek

from its intersection with Jumper Road, Plains Township; that the T-shirt worn by the Defendant that evening was found approximately 40 feet from a necklace, blouse, bra and pantihose belonging to Sharlene Fedor, which items were found in a pull-off area on Jumper Road next to Mill Creek; that the cause of death was manual strangulation and a contributing factor was blunt force trauma to the head and face. (N.T. 219-20, 246-47, 295-96, 298-300, 304, 338-340, 387, 401-406, 431-44).

"No evidence was introduced by the Commonwealth that the Defendant talked to or contacted Sharlene Fedor either inside Rumors Bar or in the parking lot that evening or that the Defendant drove Sharlene Fedor to Mill Creek or that the Defendant and Sharlene Fedor were seen together anytime that evening. No physical trace evidence was introduced to connect the Defendant to Sharlene Fedor.

"Both Rumors Bar and Mill Creek were locations frequented by a numerous class of people who could have created a sequence of events which culminated in the death of Sharlene Fedor. (N.T. 327-28, 342-43, 346-54, 220-21).

"There was potentially a large number of people at Rumors Bar and Sharlene Fedor was observed entering Rumors Bar with an

unidentified male who had paid her cover charge and was not identified as the Defendant. (N.T. 220-21-228). At the time she was seen in the parking lot adjoining Rumors Bar, there was a substantial number of people in that parking lot besides the Defendant and Sharlene Fedor, some of whom could not be identified. (N.T. 296-300). Additionally, the Mill Creek swimming area is frequented by many people in Luzerne County. (N.T. 327-28, 342-43). Evidence was introduced by the Commonwealth to show that the Defendant had frequented Mill Creek on previous occasions to go swimming. (N.T. 177). The Defendant's common membership in these two classes cannot alone establish him as the murderer because the number of individuals common to both classifications is relatively large. Moreover, evidence was introduced that other people were seen in the immediate vicinity where Sharlene Fedor's body was ultimately recovered on the morning of June 30. In particular, an unidentified nude male was observed in that immediately vicinity who, upon questioning by some swimmers, offered vague and contradictory explanations of his presence. (N.T. 346-54).

"While the Commonwealth may rely upon circumstantial evidence to prove its case, a guilty verdict cannot be based upon suspicion, conjecture or surmise. *Cmwlth v. Godon,* 329 Pa. Super. 42, 477 A.2d 1342 (1984); *Cmwlth.*

*v. Nelson*, 320 Pa. Super 488, 467 A.2d 638 (1983). To establish guilt based upon circumstantial evidence, 'the inferred fact must flow, beyond a reasonable doubt, from the proven fact where the inferred fact is relied upon to establish the guilt of the accused or the existence of one of the elements of the offense.' *Cmwlth. v. Meredith*, 490 Pa. 303, 416 A.2d 481 (1980).

"In this case, the verdict is predicated upon the Defendant being at Rumor's Bar in the early morning hours of June 30 while Sharlene Fedor was also present; That the victim's clothing and a T-shirt worn by Defendant that night were found fifteen yards apart in a parking area near Mill Creek in Plains Township; that the victim's body was discovered floating in Mill Creek at approximately 1:30 p.m. on June 30; and that the Defendant is part of a common group that frequented Rumor's Bar and Mill Creek on June 29-30, 1990.

"Circumstantial evidence which establishes nothing more than a defendant's mere presence at the scene is insufficient to sustain a conviction in the absence of any evidence to connect a defendant to the crime. *Cmwlth. v. Voss*, __ Pa. Super. __, 482 A.2d 593 (1984); *Cmwlth. v. Jones*, 312 Pa. Super. 496, 459 A.2d 11 (1983); *Cmwlth. v. Keg*, __ Pa. Super. __, 492 A.2d 48 (1985); *Cmwlth. v.*

*Johnson*, 355 Pa. Super. 37, 513 A.2d 476 (1986). Moreover, presence at the scene of a crime and the additional element of flight, which is as consistent with fear as with guilt, does not convert mere presence into proof of guilt. *Cmwlth. v. Cox*, 460 Pa. 566, 333 A.2d 917 (1975); *Cmwlth. v. McCrea*, __ Pa. Super. __, 454 A.2d 132 (1982).

"The only inference that can be drawn from these facts is that the Defendant was at Mill Creek sometime on the morning of June 30, which inference arises from the presence of his shirt. Inferences that the Defendant drove Sharlene Fedor to that area, ripped off her clothes, and carried her dead body down the Creek amount to mere speculation and conjecture.

"Under the circumstances, the evidence is either insufficient to sustain the verdict or, alternatively, only marginally supports the verdict as to shock one's sense of justice as Defendant's conviction is based upon his mere presence at the scene.

"Defendant further contends under this review that the evidence does not support a finding of a specific intent to kill Sharlene Fedor. Criminal homicide constitutes first degree murder when committed by an intentional killing. An intentional killing is defined as a willful, deliberate and premeditated killing. 18 Pa. C.S.A. 2502(a)

(d). Such a killing is one which is accompanied by a specific intent on the part of the perpetrator to bring about the victim's death and can be proven from the circumstances of an event. *Cmwlth. v. Harvey*, __ Pa. __, 526 A.2d 330 (1987). In this instance, no evidence was offered by the Commonwealth as to the degree of force necessary to strangle the victim or the cause of the trauma to her head or any other events suggesting a specific intent to kill."

The Commonwealth added that there are some additional circumstantial facts:

"1. That the defendant and victim were both seen in the parking lot of Rumors Bar after 3:00 a.m.

2. That victim was confused, disoriented and searching for her car (N.T. p. 207-208).

3. That defendant denied to police that he was at Rumors Bar on the night in question, that he had even been there, or that he knew where it was (N.T. p. 479).

4. That not only was he at Rumors Bar that night (N.T. p. 791, 842) but that he had been there before. (N.T. p. 260, 841).

5. That defendant denied to police that he had ever been past Vo-Tech School, or that he had ever been swimming in Mill Creek off Jumper Road. (N.T. p. 479, 813).

6. That he had been swimming or fishing in Mill Creek off Jumper Road several times before. (N.T. 797, 813).

7. That not only was defendant's T-Shirt, worn by him that night, found at the scene near the victim's clothing, but that a hair, identified as consistent with defendant's by an FBI expert was found in a puddle of water which also had in it a piece of victim's jewelry and was located near her torn clothing. (N.T. p. 439, 441, 668-670).

8. That defendant went swimming in Mill Creek on Jumper Road after leaving Rumors Bar, in the early a.m. of June 30, 1990, and that his clothes were wet. (N.T. p. 796, 798, 799, 842).

9. That the time of victim's death was between the hours of 4:00 a.m. and 6:00 a.m. on June 30, 1991. (N.T. p. 887 Cm. Ex. #5).

10. That the victim smoked Eve Light Cigarettes and that a pack of cigarettes with floral design was found in her purse with three cigarettes missing, the purse being in the water near her body. (N.T. p. 117, 436).

11. That three cigarettes with a floral pattern were found at the scene, near the victim's necklace. (N.T. 436-439).

> 12. That saliva tests showed that the saliva in one of the three cigarettes was not that of the victim, but was that of an A-secretor. (N.T. p. 625-626).
>
> 13. That the defendant was an A-secretor (N.T. p. 624). That the defendant smoked. (N.T. p. 183)."

The Commonwealth suggests this case is analogous to *Cmwlth. v. Holcomb*, 498 A.2d 833.

Let us review what the Court stated on pages 845, 846 and 847:

> "Viewing the evidence in the light most favorable to the Commonwealth and drawing, as we must, all such logical inferences from it, the evidence is sufficient to support a finding of guilt on the murder charge. *Commonwealth v. Pronkoskie, supra; Commonwealth v. Kichline, supra.* Considering the evidence in that light, the following facts appear from the record. The victim was last seen at a shopping center around 6:15 P.M. on Saturday, January 16, 1982. The appellant was seen around 6:10 or 6:16 p.m. the same day at a beer distributorship adjoining the store outside of which the victim was waiting for her friend. The car the victim had occupied was found miles away from the shopping center the next day with her body nearby, although the car itself was first seen there about 9:30 on that

same Saturday night. Its interior was burned, and the heat had stopped the victim's watch at 7:57 p.m.

"January 16, 1982, was one of the coldest days of that year in Beaver County, with temperatures many degrees below 0°. Between 8:00 and 8:30 p.m. that frigid evening, the appellant appeared on foot at a house about one mile from where the victim's body was found. He was suffering from the cold and stated that he had been walking outside for a long time. He was not dressed for a walk in that weather. When he came inside, he asked the residents of the house if there were any scratches or blood on him. After warming himself, he was driven at his request to a convenience store beyond the mall where the victim had last been seen alive and where appellant's car remained. From there, he called a relative who took him to his own car at the mall where the abduction took place.

"In talking to the police, appellant gave them several different false versions of his activities at the time of the crime. See *Commonwealth v. New,* 354 Pa. 188, 205, 47 A.2d 450, 460 (1946) ('The fabrication of false and contradictory accounts by an accused is a circumstance that militates against him.'). This appellant gave four different false accounts of his activities on Saturday, January 16, 1982, in an effort to create an alibi. During questioning

at the police station he initially stated that he was at a bar in Industry, from 11:00 a.m. to 11:00 p.m. that day. Later, when he knew that the police had contradictory information, he stated that he had left the bar for a short time and had come back at 10:00 p.m. Soon after that, he stated that he was first in a bar in Homewood about noon, where he had met two persons named Jeff and Bill. He then stated he went to Industry at 2:00 p.m., that Jeff and Bill met him there around 5:00 or 5:30 p.m., and they all left, going to several places in Ohio and Pennsylvania. While they were driving they argued, and he left the car, travelling on foot to the Tice residence. Finally, after his arrest, appellant told the Chief of Police that everything said earlier was wrong, that in fact he was with a married woman all day, and he had left her car to walk to the Tice house. Eyewitness testimony shows that appellant was in Industry until 4:00 p.m., in Monaca until about 6:00 p.m., and was next seen at the Tice residence soon after 8:00 p.m.

"Uncontroverted evidence places the person who killed Mrs. Vespaziani at not one, but several precise locations at relevant times. That person would have been at the mall sometime between 6:15 and 6:30 p.m. (when Mrs. Vespaziani's companion left her car and returned to find it missing). Appellant was seen there around that time. Indeed, his car was parked in the same lot. The person who killed

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Mrs. Vespaziani would also have been in the vicinity of the victim's car shortly after her death. The victim's charred watch establishes that the car was burned around 8:00 p.m. that night. Therefore, the killer would have been in that sparsely populated area shortly before 8:00 p.m. The victim and the car disappeared at the same time. They were later found about half a mile apart. It is highly unlikely that the killer would have fled the scene in another car. Thus, a jury could properly infer that the killer left on foot. This appellant did appear on foot at an isolated farm house a little less than one mile from the car and the body shortly after 8:00 p.m.

"Only a limited class of people were at each of these locations at the various times necessary to carry out the whole sequence of events which culminated in Mrs. Vespaziani's rape and murder. At each time pinpointed by an established fact, the intersection of these classes, i.e. those people who could have committed the killing, grows smaller and smaller. Moreover, the rate by which the class decreases accelerates by virtue of the logic of probabilities. There was potentially a large number of people at the shopping center at 6:15 p.m. There were substantially fewer people who were near the area where the body was found. Common membership in these two classes, however, cannot alone establish the identity of the murderer because the number of

individuals common to both classes is still relatively large. The additional known facts set forth above do establish beyond a reasonable doubt that the appellant was a member of both those classes and the much more limited class of people who were walking in the open country within a short distance of the victim's body, not suitably dressed for walking in such bitter weather at or about the time of the crime.

"Other inferences bolster this analysis. Because appellant was not dressed for walking a great distance in the cold weather, the jury could have inferred that he had not planned to spend time outside, but was forced to do so by some emergency. Testimony about how cold he was at the house shows that he did walk some distance outside. This counterbalances any possible argument that he might have come from some nearby house. His own question about whether there were scratches or blood on him implies his knowledge that he had been involved in some recent struggle. The killer, also, would have been so involved because the record shows the victim resisted. Finally, the appellant's inconsistent statements show an attempt to conceal the truth. Such fear is relevant in determining the sufficiency of circumstantial evidence.

"This Court has stated that mere presence at the scene of a crime is not sufficient to support a guilty verdict. *Commonwealth v.*

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*Keblitis*, 500 Pa. 321, 456 A.2d 149 (1983); see also *Commonwealth v. Jones*, 312 Pa. Superior Ct. 496, 459 A.2d 11 (1983). The evidence introduced by the Commonwealth does not go solely to presence. Appellant's question about whether there was any blood on his jacket does not establish mere presence; it allows the jury to infer, when viewed in favor of the Commonwealth, that he was at the scene and participated in the killing. The fact that appellant gave several inconsistent versions of his activities that day indicates not that he was in the car but, rather, that there was some attempt to hide his true whereabouts. These facts are evidence beyond mere presence at the time of the crime and support the jury verdict of first-degree murder.

"From all these circumstances a jury could have first inferred beyond a reasonable doubt that the appellant was present when Sandra Vespaziani was raped and killed. From his statements, both what was and was not said by him at the farmhouse to which he walked and sought shelter shortly after the crime, that same jury could infer beyond a reasonable doubt that he brutally raped and killed her. Although the evidence established that he was present at the scene of the crime he falsely stated to the people in the farmhouse that he had been thrown out of a car by some drinking buddies. Since he was present at the scene, his failure to mention anything about it, the burnt car, the

body or any other fact concerning the crime, is inexplicable and as such forms another basis for an inference of guilt.[13] This inference is strenghtened by his later lies to the police in an effort to establish an alibi. On such evidence the jury's finding that he had committed the crime must stand.

"While no single item of evidence proves guilt, the evidence as a whole does provide a basis sufficient to sustain the jury's verdict. The class intersection analysis shows the probability is so small that persons other than appellant belonged to all of the relevant classes that the jury verdict convicting him must be sustained.

"Appellant also claims that the prosecution did not prove that the killing was willful, deliberate or premeditated and thus did not rise to first-degree murder. This argument, too, must fail. While *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979), precludes any presumption of premeditation from the mere fact that a deadly weapon was directed against a vital part, a jury may infer this requisite specific intent to kill from the particular manner in which a deadly weapon is used against a person.

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13. This inference does not violate the prohibition of using tacit admissions in criminal cases as appellant was not in custody nor in the presence of the police. See *Jenkins v. Anderson*, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86.

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> *Commonwealth v. Pronkoskie, supra; Commonwealth v. Meredith,* 490 Pa. 303, 416 A.2d 481 (1980). While the jury is not compelled to make that inference, a conviction based on it need not be overturned for insufficiency. The evidence here shows that the victim died as a result of multiple knife wounds to the neck. From them, the jury is permitted to infer the specific intent to kill and to convict the appellant of first-degree murder when he was identified as the killer."

While we have no scratches here, we have the Defendant at Mill Creek the morning of June 30, 1990, and his clothes were wet. As in the *Holcomb* case, the Defendant lied about his presence at the Rumors Bar as well as his presence at Mill Creek; that there was evidence of a struggle, and the coroner's testimony that death was due to manual strangulation, with blunt force trauma to the head and face. He testified concerning bruises and abrasions on the victim's body and further testified that the victim was dead before being placed in the water.

All of this is consistent with the *Holcomb* case, and we find that there was sufficient circumstantial evidence to sustain a verdict of murder in the first degree.

For the foregoing reasons, we enter the following:

END OF DECISION

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IN THE COURT OF COMMON PLEAS
OF LUZERNE COUNTY

CRIMINAL
NO. 2175 of 1990
Before: Brominski, J.

COMMONWEALTH OF PENNSYLVANIA

Vs.

JOHN DOMINIC TRAVIS

ORDER

NOW, this 11th day of July, 1991, at 3:20 o'clock P.M., it is hereby ORDERED, ADJUDGED and DECREED that the Defendant's Motion for a New Trial and/or Arrest of Judgment is DENIED and DISMISSED, and the Defendant shall appear before this Court for sentencing WEDNESDAY, SEPTEMBER 11, 1991, at 9:15 A.M. in Courtroom No. 1, Luzerne County Courthouse, Wilkes-Barre, Pennsylvania.

BY THE COURT,
s/ Brominski
J.

Jerome L. Cohen, First Asst. D.A.
Amy L. Hallenbeck, A.D.A.
For the Commonwealth

Al Flora, Jr., First Asst. P.D.
John R. Sobota, A.P.D.
For the Defendant